

Explainer

● What did the apex court say

THE SUPREME COURT observed a series of legal and procedural failures on the part of the resolution professional (RP), the successful resolution applicant, the Committee of Creditors (CoC), the National Company Law Tribunal (NCLT), and the National Company Law Appellate Tribunal in the approval and implementation of resolution plan of Bhushan Power and Steel. It held that the resolution plan approved by CoC and NCLT was not in compliance with the mandatory requirements of the Insolvency and Bankruptcy Code, 2016 (Code). Given the irregularities that tainted the resolution process, the Court, exercising its powers under Article 142 of the Constitution, directed the liquidation of the company.

● Invoking Article 142

ARTICLE 142 HAS been invoked in several insolvency matters, primarily to avoid liquidation. In the Essar Steel case, though both resolution applicants were ineligible on the relevant date, the Court invoked Article 142 to grant them time to cure their ineligibility. One applicant did so, submitted a resolution plan, and successfully rescued the company. Again, in a case involving Jaypee Infratech, as the 270-day resolution period had lapsed before homebuyers were recognised as financial creditors, the Court invoked Article 142 to restart the process afresh. This led to the submission and approval of a resolution plan, resulting in the company's revival.

INSOLVENCY & BANKRUPTCY CODE



Insolvency rules at a crossroads?

Earlier in May, the Supreme Court rejected the resolution plan by JSW Steel for Bhushan Power and Steel, and directed liquidation of the company. *MS Sahoo*, first chairperson of the IBBI, explains various provisions of the Insolvency and Bankruptcy Code under which immunity is granted to a corporate debtor for past offences

● What is the clean slate theory?

THE CLEAN SLATE theory embodies the principle that, upon approval of a resolution plan under the Code, the corporate debtor (CD) is relieved of its past liabilities, enabling it to make a fresh start. This principle operates in two key ways: first, under Section 31(1), all claims not included in the

approved resolution plan are extinguished; and second, under Section 32A, the CD is granted immunity from prosecution and protection against attachment of its assets for offences committed before the commencement of the corporate insolvency resolution process (CIRP).

THE CLEAN SLATE THEORY EMBODIES THE PRINCIPLE THAT UPON APPROVAL OF A RESOLUTION PLAN UNDER THE CODE, THE CORPORATE DEBTOR IS RELIEVED OF ITS PAST LIABILITIES

Section 32A

IMMUNITY GRANTED TO CORPORATE DEBTOR HINGES ON APPROVAL OF THE RESOLUTION PLAN

● Conditions to be fulfilled for grant of immunity under Section 32A

SECTION 32A PROVIDES that the liability of a corporate debtor (CD) for an offence committed before the commencement of the CIRP shall cease, and the CD (with successful resolution applicant, post-resolution) shall not be prosecuted for such an offence from the date the resolution plan is approved by the National Company Law Tribunal (NCLT), if the resolution plan results in the change in the management or control of the CD. However, the individuals who were responsible for the conduct of the business of the CD and were

directly or indirectly involved in the commission of such offence shall continue to be liable for prosecution and punishment. Further, no action shall be taken against the property of the CD in relation to past offences, where such property is covered under an approved resolution plan that results in a change in control of the CD. This provision aims to encourage prospective resolution applicants to submit resolution plans undeterred by uncertainties surrounding the offence committed by the CD before the CIRP.

● Payments owed to the operational creditors

SECTION 30(2) OF the Insolvency and Bankruptcy Code prescribes the minimum amount that must be paid to operational creditors under a resolution plan. It further provides that the payment to operational creditors shall be made in such manner as may be specified by the CIRP Regulations.

Regulation 38 of the CIRP Regulations, 2016, both before or after its amendment on August 16, 2019, mandates that this amount shall be paid in priority over the payments to the financial creditors. The resolution plan in this matter allegedly envisaged the financial creditors to be paid in priority over the operational creditors.

● Eligibility of resolution applicants

SECTION 29A MAKES certain persons ineligible to submit resolution plans. Importantly, it extends the ineligibility to connected persons. The ineligibility is assessed as of the date of submission of the resolution plan. The law requires that the resolution applicant submit an affidavit confirming eligibility under Section 29A along with the resolution plan. The RP is then required to verify and certify that the contents of the affidavit are in order. In this present case, the RP allegedly failed to submit the certificate.

The writer is a former chairperson of the Insolvency and Bankruptcy Board of India